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Supreme Court of The United States

NO. 425

OCTOBER TERM, 1961

WILLIAM H. "BILL" CROSS, FLOYD L. CULLINS, LYMAN GAGE REYNOLDS, ALDEEN CARSWELL and AMOS HARRIS, JR.,

Appellants,

-vs-

STATE OF FLORIDA,

Appellee.

RESPONSE TO QUESTION THREE

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TOPICAL INDEX TO BRIEF

	Page
RESPONSE TO QUESTION THREE	1-9
CONCLUSION	9

TABLE OF CITATIONS

CASES

Goldman v. United States, 1942, 316 U.S. 129, 62 S. Ct. 993, 86 L.Ed. 1322 — 2, 6

Olmstead v. United States, 1928, 277 U.S. 438, 48 S. Ct. 564, 72 L.Ed. 944 — 2, 6

On Lee v. United States, 1952, 343 U.S. 747, 751, 72 S. Ct. 967, 96 L.Ed. 1270 — 1, 6, 7

Silverman v. United States, 5 L.Ed. (2d), 743, 81 S. Ct. 679, 275 F. 2d 173 — 1, 2, 3, 6, 8

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RESPONSE TO QUESTION THREE

Question three as posed by appellants at page 5 of their jurisdictional statement reads as follows:

> "3. Did the acts of the State Officers in lowering an electronic listening device down into an air shaft from the apartment above, into the apartment that was subsequently searched, to obtain evidence that was used as a basis for probable cause for the issuance of the search warrant constitute an unlawful or unreasonable intru-

> sion into a constitutionally protected area as condemned and defined in the case of Julius Silverman vs. United States, No. 66, decided March 6, 1961, 5 L.Ed. (2d) 743, 81 S. Ct. 679?"

Though it is impossible to determine from a reading of this Court's opinion in the *Silverman* case, supra, just what a "constitutionally protected area" is, one well may conclude that, at least in the *Silverman* case, supra, it was the heating duct which served exclusively the house occupied by Silverman, et al.

For the very same reason that this Court, in the *Silverman* case, supra, found no need to reconsider its previous decisions (ostensibly *On Lee v. United States*, 1952, 343 U.S. 747, 751, 72 S.Ct. 967, 96 L.Ed. 1270; *Goldman v. United States*, 1942, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322; *Olmstead v. United States*, 1928, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944), so here there is no need (because of the obvious difference in factual circumstances) to examine into the question of a constitutionally protected area past the points to be made in support thereof, post.

It clearly appears that a more detailed word picture as to the factual circumstances surrounding the condemned intrusion in the *Silverman* case, supra, may be gleaned from the dissenting opinion of Circuit Judge Washington. See *Silverman v. U.S.*, 275 F. 2d 173, 178-180. Admittedly, said dissenting

opinion is the most damning with reference to the acts perpetrated by the District of Columbia police officers. Painting their activities in their worst possible light, the following appears to have transpired:

> "The police gained entrance—quite legally—to the row house next to that occupied by appellants. They then carefully probed the brick party wall between the two houses in search of an advantageous spot for the insertion of their eavesdropping device—a needle or spike about twelve inches long, connected to an amplifying circuit. The testimony indicated that the spike, in order to serve its purpose adequately, had to come in contact with a solid object capable of resonance. Mere insertion in the plaster or brick of the wall would be ineffective. The desired sound reception was obtained by inserting the spike about seven inches into the party wall, under the baseboard, at a point where the wall contained the metal heating duct for appellants' house. The heating duct was an excellent vibrator, and furthermore ran into the bedroom as well as the living room of appellants' house. Every inference, and what little direct evidence there was, pointed to the fact that the spike made contact with the heating duct, as the police admittedly hoped it would. Once the spike touched the heating duct, the duct became in effect a giant microphone, running through the entire house occupied by appellants. The spike was the conductor by which sounds in appellants' house were transmitted to the amplifier in the adjoining house. Conversations on both floors of the appellants' house were clearly heard by the police through earphones attached to the amplifier."

From the above as well as the specific pronouncement of this Court in its order and opinion reversing the Court of

Appeals, it appears conclusively that the heating duct, which furnished the sounding board by means of which the "spike-mike" could so admirably function, was a self-contained unit serving no structure other than the house which Silverman et al. occupied. To get to it, and perforce touch it with the mike in question, the officers had to penetrate the party wall separating the two structures. It is this penetration with the attendant contact of the mike with the heating duct *in appellants' house* that this Court condemned as an actual unlawful intrusion into a constitutionally protected area.

In order that this Court reach its condemning opinion, it had to conclude that the heating duct in question constituted a constitutionally protected area. With this Court's opinion in the *Silverman* case, supra, appellee has no quarrel whatever. However, appellants' effort to enlist *Silverman v. U.S.*, supra, in aid of their conclusions is, in appellee's view, entirely unwarranted.

This is so because of the salient difference between the common ventilating shaft employed by the agents in the instant case—it being one serving the entire St. Johns Apartments—and the single unit heating duct system used to advantage by the police officers in the *Silverman* case, supra. The heating duct in the *Silverman* case, supra, was part and parcel of the house in which Silverman's activities were carried on. Not so in the instant case. Any right appellants might seek to claim in the common ventilating system in this case is one shared by every tenant in the building in much the same way they share their rights in the respective hallways, stairwells and other passages of ingress and egress. Indeed, if it were large enough it could

logically be said that the common ventilating shaft was available to every tenant for any use not inconsistent with either the terms of his leasehold or the purposes for which the property was let by the lessor. To be sure, it being limited in size so as to preclude any use such as that suggested above, said common ventilating shaft was a passage for air to each and every (jointly and severally) one of the tenants lawfully in the building.

Though there is no evidence whatever in the record in the case at bar to demonstrate that in fact appellants' rental rights gave them any rights whatever in said common ventilating shaft, even if it be conceded arguendo (the only way appellee might) that they in fact had some degree of a possessory interest therein, it was, appellee respectfully submits, an interest shared by each and every other tenant indivisibly. Therefore, it is folly to suggest that even this may be characterized as a "constitutionally protected area."

Just as the hallways of the Shoreham Hotel in Washington, D. C., are not a part and parcel of the rights inuring to the roomers there, so in this case the hallways could not so be styled. Just like the Shoreham Hotel's duct work provides warmth in the winter and refrigerated air in the summer, it does not become the property of any given roomer, except insofar as it provides them with that beneficial service, so here the common ventilating shaft was, except for the service it provided the several tenants, if anybody's property, the lessors'.

If the above rationale should be in any way deemed defective, the following result must come about, to-wit: if a lawfully occupying tenant in an apartment several stories above that of a suspect's (as well as laterally distant from him) were to remove the grid from the ventilating shaft that entered his apartment and simply place a powerful pick-up microphone inside the duct-work (according to appellants—their duct-work), whatever his microphone had picked up would in fact be useless as evidence on the theory that it was obtained by an invasion of the privacy of a constitutionally protected area. Such a result, though seemingly possessed of logic is, of course, not only impossible but indeed incredulous, for no illegal intrusion whatever was made because the suspicious tenant had a right in the duct-work not in the least subservient to that of the suspected tenant.

If, on the other hand, appellants would argue that their possessory interest in said duct-work was limited to the physical perimeter necessary to serve their particular apartment, then one wonders just how other tenants in that same building could secure ventilation from that restricted and private area. This, of course, is where the head of the monster must fall, to-wit: might this not be likened to the case of an outside fire escape? Since the outside fire escape is physically attached to each apartment it serves, one might argue that the tenant rents or leases that too. Yet, who would argue that the very purpose for which it is designed, erected and maintained is to serve all the tenants? We think that no one could, in good conscience, argue that point. By the same token, we respectfully submit that there is not one scintilla of difference in principle

between the fire escape illustration and the common ventilating shaft here involved.

At first blush it might be said (certainly appellants do) that this case falls squarely within the purview of this Court's condemnation in the *Silverman* case, supra. Perhaps conversely, an objectively inclined and totally disinterested third party might urge that the factual situation here fell neither within the *Silverman v. U.S.*, supra, case, nor within *Goldman v. U.S.*, supra, but rather somewhere in between. To be sure, if this were so, it well might require this Court to render an opinion covering those particulars, inasmuch as its opinions in the *Silverman*, *On Lee*, *Goldman* and *Olmstead* cases, supra, do not in fact limn the question. However, no such judicial labors can honestly be said to be necessary here.

Equating the fire escape illustration set out ante with that of the "detectaphone" employed in the *Goldman* case, supra, it does appear that the conclusion of absolute mirror images must follow—the respective areas from which the intelligence was gleaned being public and private; neither one of which caused an illegal invasion of the suspect's own privacy.

Collocating this Court's reasoning in *Olmstead v. U.S.* supra, wherein it said:

> "'There was no entry of the houses or offices of the defendants.' 277 U.S. at 464. Relying upon these circumstances, the Court reasoned that '[t]he intervening

> wires are not part of (the defendant's) house or office any more than are the highways along which they are stretched.' 277 US, at 465."

with the (by now) obvious fact that this ventilating shaft could not be, by any stretch of the imagination, considered a part of appellants' apartment any more than was a segment of said ventilating shaft located several stories above and to the rear of their apartment; one must conclude that even that guiding principle (*Olmstead v. U.S.*, supra) has far more applicability here than would the *Silverman* case, supra, at any given time.

When placed in juxtaposition to this Court's opinion in *On Lee v. U.S.*, supra, wherein, it was said:

> "'. . . no trespass was committed.' The agent went into the petitioner's place of business 'with the consent, if not by the implied invitation, of the petitioner.' 343 US, at 751, 752."

one is compelled to note (by dint of negative comparison) the controlling aspect set out therein of the case at bar, to-wit: the agents in the *On Lee case*, supra, were lawfully in the premises either with the consent or by the implied invitation of On Lee—here, since no ownership, custody, interest, control, or other form of possession of said common ventilating shaft was vested in the appellants, no consent or implied invitation by the appellants could conceivably have been given the investigating officers. Indeed none was necessary.

Just as this Court must agree that a tenant in an apartment building whose emergency egress is assured by virtue of a physically attached external fire escape over which no tenant has any control, interest or custody (which is not that of every tenant), so here the Court must conclude that a tenant in the St. Johns Apartment building whose ventilating needs are served by virtue of a common ventilating shaft has no control, interest, or custody (which is not that of every tenant) over said common ventilating shaft.

CONCLUSION

So it is that when viewed in the light of the above, it follows as the night the day that in fact and truth the area in question was not, is not and well may never become the "constitutionally protected area" contemplated by this Court in the *Silverman* case, supra. This being so, it further follows that this appeal should be dismissed, or, if it be considered as a petition for writ of certiorari, the petition should be denied.

Respectfully submitted,

RICHARD W. ERVIN
Attorney General

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Counsel for the Appellee.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Response to Question Three to the Honorable A. K. Black, Attorney at Law, Lake City, Florida, by mail, this ____ day of December, 1961.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Appellee.